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The proprietary system and its remedy.

The Proprietary System.

AND ITS REMEDY.

BY F. E. STEWART, M. D., PH. G.—SECOND EDITION WITH COMMENTS.

I.

The Proprietary System.

For the purpose of promoting progress in science and the useful arts the Constitution of the United States gives Congress the power to grant to authors and inventors for limited times the exclusive use of their respective writings and discoveries. Hence our copyright and patent laws.

A patent is a contract between the government, representing the public at large, and the inventor. The consideration moving from the government is the granting of the exclusive use of the invention for a limited time. The consideration moving from the inventor is the invention of a new and useful article, and the giving to the public full knowledge of it by a proper application for a patent, so that, when the patent expires, the public may manufacture the invention. The wisdom of such a law seems apparent, for by it inventors are stimulated to produce new and useful articles, capital is protected during the working and marketing of the invention until the investment becomes remunerative, knowledge is increased, and the archives of the patent office become a great public library and industrial exhibit, free to the use of the public, and commerce is promoted by valuable additions to the list of marketable commodities.

A trademark is a "*commercial signature*" employed to distinguish one brand of an article from another brand of the same article on the market. Its use does not confer on the user any exclusive right to the manufacture and sale of the article upon which the trademark is branded. In law the trademark has two uses. One is to designate ownership, illustrated by the common method of branding horses and cattle so often seen on the ranches of the great West. Another use is to designate source of emanation or of manufacture. For this reason the lumberman brands his logs with a trademark, or the manufacturer of pottery stamps his wares with peculiar marks or signs. In the same way the manufacturers of silk, linen and other fabrics use the words "Lyon," "York Mills," etc., as trademarks, to distinguish their various brands of goods from other brands of the same articles on the market. But these uses of the trademark do not vest in the users the right to the exclusive handling, or manufacture and sale of the articles upon which the trademarks are branded. The man who brands his cattle with a trademark does not acquire thereby a monopoly in cattle; neither does the use of trademarks by potteries, silk manufacturers, makers of linen and other fabrics, vest in the users the right to exclude others from making and selling the same commodities.

Another use of the trademark has sprung into being as a development of modern times—a use not contemplated by law. The method to which I refer is the registering at the Patent Office of the only name by which an article is known as a trademark on said

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Dr. Henry D. Holton, of Brattleboro, Vt., Treasurer of the American Public Health Association, in his letter of Sept. 6, 1894, says: "Your paper on Proprietary System has been carefully considered. I cannot add to it anything that would improve it. It strikes me as a correct solution of a difficult question."

Henry C. Blair, Ph. G., of 800 Walnut street, Philadelphia, one of the leading pharmacists in that city, says in his letter of Sept. 4, 1894: "I think your idea on Proprietary Remedies as stated in circular sent are thoroughly professional and practical, and I hope you will succeed in your work."

Dr. Boardman Reed, of Atlantic City, in his letter of Aug. 27, says: "I have read your paper with interest and profit, and am prepared to assent to much that you say therein. The Proprietary System is clearly objectionable and ought to be reformed, but I cannot yet see my way to favoring the remedy which you propose. It might be less objectionable than the evil now existing, but would of itself be liable to abuse."

Prof. Frank Woodbury, M. D., of Philadelphia, a well known authority, Chairman Section on Materia Medica and Pharmacy, American Medical Association, writes from Glen Summit, Pa., Aug. 3, and says: "I have just read your article on the Proprietary System and Its Remedy, and circular to members of the American Medical Association. I think that your argument is sound and ought to be convincing to any reasonable mind. The remedy suggested should be tried, but I think that it is not the only possible one, though perhaps the only practicable one at present. I think that the best solution of the problem would be to secure a 'Commissioner or Secretary of Sanitation,' with similar responsibilities as other Cabinet officers. When a department of the Public Health has been established at Washington with chemical and bacteriological laboratories, it would be possible for any citizen, physician or layman, to have an authoritative analysis made of any secret medicine at any time, and so reports would find their way into the newspapers. It would also become the duty of the Secretary to limit or forbid the sale of injurious preparations containing morphine, digitalis, arsenic, etc., as is done by the Japanese Government. Ownership in processes and methods, as you suggest, should be made to conform to the general patent laws."

Prof. J. U. Lloyd, of Cincinnati, says: "I have read your paper over and over, and when I take the subject into consideration I believe that what I have already said as President of the American Pharmaceutical Association applies still to the problem. I think that you will find that my remarks therein agree quite well with those you voice."

Dr. George M. Sternberg, Surgeon General United States Army, in his comments received Sept. 10, 1894, says, in relation to the proposed committee (see last two paragraphs of this paper): "I approve."

Dr. Charles S. Rodman, Waterbury, Ct., in his letter of Sept. 17, 1894, says: "The cure for the Proprietary System is the higher education of the medical profession. The remedy proposed if secured by law will, like many elixirs, be pleasant—more, it will be educational. But so long as medicine is so nearly free to all, and its dispensation the avocation of thousands almost as credulous as its recipients, so long will preparations of which the prescriber knows little be sold and used. With increase of knowledge there will be few cases to be *cured* by drugs. Eliminate the incurable, the self-limited and the disorders of functions by which the cause can be recognized and avoided, and there will be little need of a complex, a mysterious or even an elegant pharmacy."

article. This use of the trademark has created what is known as the PROPRIETARY SYSTEM. This system should not be confounded with the patent system, as it is, in principle and practice, directly opposed to it, as a further consideration of the subject will show.

The monopoly created by registering the only name by which an article is known as a trademark upon such article is unconstitutional, illegal and unscientific. These charges I now proceed to prove.

The monopoly is unconstitutional because unlimited in nature. *Congress has no power to grant perpetual monopolies.* I grant that the right to use a trademark cannot be limited by law. But, as I said before, when one puts his commercial signature on his goods he acquires thereby no exclusive right to the manufacture and sale of articles so marked. No monopoly whatever can result from the *proper use* of a trademark. Only its misuse or abuse creates the so-called *Proprietary System.*

The monoply is illegal, for there is no law in the statute books of the United States designed to protect the new use of the trademark. On the contrary the courts have decided that when a new article of commerce is born it must be provided with a name; and that any one has a perfect right to manufacture and sell the article under the name by which it is known to the public provided the article is not patented*. In case the article is patented no one has a right to make and sell it under that name or any other name until the patent expires. Furthermore, the name, by use becomes descriptive. A name is descriptive if commonly used by the public in designating the article when purchasing it†. And it is an axiom of law that a descriptive name cannot be a trademark. An absurdity that might occur by misusing a trademark in this way illustrates the subject very well. The trademark law permits the employment of the same trademark as many times as there are classes of articles. The word "Lyon," for example, can legally be used as a trademark on logs, silk or tin-plate. In the same manner the word "Lactopeptine" may be branded on a cow with just as much propriety as upon a medicine. The very impossibility of such a thing occurring demonstrates most clearly that the name Lactopeptine is not a trademark when applied to the well known article so called, but its proper or descriptive appellation, the present manufacturer to the contrary notwithstanding.

The monopoly is unscientific because it is protective of secrecy. While in many instances the ingredients of proprietary medicines advertised to the medical profession are given, their true, or working formulas, whereby the public (pharmacist) may manufacture them are rarely published. The disadvantage of this to pharmacy must be apparent to any thoughtful mind. Pharmacy is the *science* of preparing medicine. Therapy is the science of applying medicine to the cure of disease. Materia Medica is the name given to the collection of substances used as medicine. These three were formerly classed under the general term Pharmacology, or the science of drugs. Pharmacy, then, is a branch of medical science, and should be represented in scientific medical literature alongside of Therapeutics and Materia Medica, as a part of that science. But the proprietary system stands directly in the way of it. How can Pharmacy have its

*Brown on Trade Marks.
†Ibid.

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place in medical science when the knowledge of it is locked up in trade secrecy? How can we have a scientific nomenclature to Pharmacy when many of the new medicinal compounds are introduced under "proprietary" names which can have no place in science. The Proprietary System more than any one thing prevents Pharmacy being recognized as a science, and its practice as a profession.

Finally, the patent law was designed to promote progress in science and the useful arts by encouraging inventors to invent new and useful things, and to "publish full knowledge thereof whereby the public may manufacture the invention when the patent expires." The Proprietary System, on the contrary, hinders progress in science and the useful arts by putting in its place a system of secrecy and perpetual monopoly. Many physicians object to the open limited monopoly of the patent law as injurious to the welfare of sick humanity. *Are we to indorse the Proprietary System which is far worse, both in principle and practice.*

II.

The Remedy.

□ The main objections to the Proprietary System are its secrecy, the unlimited duration of the monopoly, and the unscientific nature of its nomenclature. The great thing in its favor is that it protects the investment of capital better than the patent law. Very few manufacturers with whom I am acquainted would object to a reasonable time limit being set on the monopoly. All manufacturers would agree to the adoption of a scientific nomenclature as far as I know of. But there are very few who would care to throw their processes open to unrestricted competition. And it seems hardly fair to ask it. Yet, unless some kind of compromise is adopted between what might be called equity and expediency the objections I have named remain in force.

Nothing can be done in this struggle with wealthy nostrum proprietors, unless the legitimate manufacturing interests will co-operate with the medical profession. Therefore, the establishment of some basis of co-operation is essential to success. Secrecy of composition is incompatible with scientific prescribing and should be prohibited; there is no special objection to allowing processes and methods of manipulation to come under the patent or copyright laws.

Now, I have a compromise to suggest which, it seems to me, would overcome the difficulty. In my recent trip across the continent with a large party of medical men for the purpose of attending the annual meeting of the American Medical Association held in San Francisco, I suggested the plan to various prominent physicians, who, in the main, agreed in regard to its desirability. It is to *permit* an inventor of a new and useful medical compound to retain the name and secret of manufacture of his invention for a limited time, provided the true working formula thereof be placed in the hands of a national committee of physicians and pharmacists, and the article marketed only under the sanction of the committee. In other words, let the system remain as it now is, only with the exceptions that a censorship shall be exercised over the market by a committee of competent physicians and pharmacists, the monopoly to be limited in time, and the system to be made scientific by providing it with a proper

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nomenclature and by the final publication of every invention whereby all pharmacists may manufacture the same when the patents expire.

I use the term *permit* advisedly. The present position of the trade is in every respect one of assumption, not permission. Pharmacy can never rank as a profession until the Proprietary System is abolished, or some compromise of the kind I have suggested be adopted. Either point once gained then it is time for the medical journals to recognize pharmacy as a prosession and invite the pharmacist to contribute the results of his researches to the medical journals. Pharmacy now only appears in the advertising pages of the medical journals, which are torn up when the journals are bound. Under such a system there is danger of the pharmacy of the nineteenth century becoming to a great extent a lost art for want of a literature. There are pharmacists who are taking the position I have mentioned now, and they should be admitted as members of county medical societies as honorary members, or active, if they take the medical degree.

Then let every manufacturing house open a scientific department manned by competent physicians and pharmacists, who can be held responsible to the profession for their utterances, and for the representations made by respective houses in labels, in circulars, in advertisements, and in the contributions of these houses to scientific literature. It would be well if the members of these scientific departments were graduates in medicine as well as in pharmacy. They could then join the American Medical Association, become members of the section on Materia Medica and Pharmacy, and contribute to the scientific proceedings, thus promoting the interests of both pharmacy and therapeutics.

At the present time there are quite a number of medical journals pretending to be independent, but really organs of various manufacturing houses. I can see no reason against, and much in favor of a manufacturing house issuing a journal as its organ; but I have nothing but condemnation for the pretender who sails under false colors as a purely scientific journal. Such a journal as *Squibb's Ephemeris*, for example, issued above board as the organ of Squibb's manufacturing establishment, but filled with scientific articles, the work of investigators in his laboratory, or elsewhere, is a valuable addition to our list of journals.

The question of the day at the recent meeting of the American Medical Association at San Francisco was, shall the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION advertise proprietary medicines? I would have the journal draw the line and admit only those whose true formulas are placed in the hands of a committee and under the restrictions I suggest. However, it must be agreed that such endorsement must not be construed as a recommendation and used for advertising purposes. And I would add another restriction, and that is, do not advertise any proprietary medicines which are advertised to the public in the newspapers.

Now, as to the complexion of the committee. I would suggest that it consist of one member each of the American Medical and American Pharmaceutical Associations, and one member each from the medical departments of the Army, Navy and Marine Hospital service, to which might be appropriately added as Chairman the Commissioner or Secretary of Public Health, if such an office is finally created by Congress.